Anthony bin Dubis v Syarikat Kuin Je Sdn Bhd

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K22–82 OF 1995
SULEIMAN HASHIM J
20 MARCH 1996

Civil Procedure *— Contempt of court — Breach of consent judgment — Consent judgment based on documents relating to licence for extraction of timber — Legality of documents — Whether there was violation of non-transferability condition in licence — Whether documents ex turpi causa and in pari delicto*

The defendants filed a notice of motion for a committal order against the plaintiff. It was alleged that the plaintiff was in contempt of a consent judgment between the plaintiff and the defendants dated 22 August 1995. The subject matter of the consent judgment was a transaction between the plaintiff and defendants emanating from five documents. The plaintiff was the holder of a licence to take forest produce ('the licence') which was non-transferable. The first three documents related to a timber extraction agreement whereby the plaintiff engaged the first defendant to extract timber for which the plaintiff was to pay the first defendant an agreed rate. The fourth and fifth documents were sale and purchase of timber agreements between the plaintiff and the second and the third defendants respectively. The issue before the court was whether any of the five documents, and hence the transaction, violated the condition as to non-transferability in the licence and thus was *ex turpi causa* and *in pari delicto*.

Held, dismissing the application:

(1) As it was alleged that the plaintiff was in contempt of the consent judgment the basis for which was and which emanated from the five documents, those documents should be read either singly or jointly to decide whether they were *ex turpi causa* or *in pari delicto* (see p 606E; *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 followed).

(2) Reading the language of the fifth document together with the other four interrelated documents, the transaction between the plaintiff and the defendants was *ex turpi causa* and *in pari delicto*. All rights under the licence had been assigned to the third defendant and the plaintiff had abandoned all his interests in the licence (see p 610F; *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 and *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 followed).

(3) The defendants could not now seek a commital order against the plaintiff under an illegal transaction in which they have participated. The courts do not overlook the fact that they do not assist a person who comes with unclean hands (see p 610H;

Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21 followed).

[Bahasa Malaysia summary

Defendan telah memfailkan satu notis usul untuk perintah komital terhadap plaintif. Plaintif dikatakan telah menghina penghakiman persetujuan di antara plaintif dan defendan-defendan yang bertarikh 22 Ogos 1995. Hal perkara penghakiman persetujuan itu adalah suatu urus niaga di antara plaintif dan defendan-defendan yang berasal daripada lima buah dokumen. Plaintif merupakan pemegang satu lesen untuk mengambil hasil hutan ('lesen itu') yang tidak boleh dipindahmilik. Tiga dokumen yang pertama adalah berkaitan dengan satu perjanjian pembalakan di mana plaintif menggaji defendan pertama untuk membalak dan plaintif dikehendaki membayar defendan pertama satu kadar yang dipersetujui. Dokumen keempat dan kelima adalah perjanjian jual-beli balak di antara plaintif dan defendan kedua dan defendan ketiga masing-masing. Isu di hadapan mahkamah adalah sama ada lima buah dokumen itu, dan oleh yang demikian urus niaga itu, melanggar syarat yang menyekat pemindahanmilik di dalam lesen itu dan lantaran itu adalah *ex turpi causa* dan *in pari delicto*.

Diputuskan, menolak permohonan itu:

(1) Oleh kerana plaintif dikatakan telah menghina penghakiman persetujuan yang berdasarkan dan yang berasal daripada lima buah dokumen itu, dokumen-dokumen tersebut seharusnya dibaca sama ada berasingan atau bersama-sama untuk menentukan sama ada mereka adalah *ex turpi causa* dan *in pari delicto* (lihat ms 606E; *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 diikut).

(2) Setelah membaca bahasa dokumen kelima bersama dengan empat dokumen yang lain yang berhubungkait, urus niaga di antara plaintif dan defendan adalah *ex turpi causa* dan *in pari delicto*. Kesemua hak di bawah lesen itu telah diserahhak kepada defendan ketiga dan plaintiff telah meninggalkan kesemua kepentingannya di dalam lesen itu (lihat ms 610F; *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 dan *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 diikut).

(3) Defendan tidak boleh sekarang memohon untuk perintah komital terhadap plaintif di bawah suatu urus niaga menyalahi undang-undang yang mereka telah menyertai. Mahkamah tidak akan melepas perhatian terhadap fakta bahawa mereka tidak akan membantu sesiapa yang datang dengan 'tangan yang kotor' (lihat ms 610H; *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 diikut).]

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Notice of Appeal filed on 17 April 1996.]

A **Notes**

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 788–837.

For cases on maxims in equity, see 6 *Mallal's Digest* (4th Ed) paras 1608–1624.

B

Cases referred to

Cheng Mun Siah v Tan Nam Sui [1980] 2 MLJ 269
Ebbw Vale Urban District Council v South Wales Area Licensing Authority [1951] 2 KB 366
C *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161
Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd [1978] 2 MLJ 198
Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21
D *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200
Tan Lai v Mohd bin Mahmud [1982] 1 MLJ 338
Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830

E **Legislation referred to**

Rules of the Court of Appeal 1994 rr 13, 14
Rules of the High Court 1980 O 45 r 5(1)(a)(i), O 52 r 2(2)
Sabah Forest Enactment 1968 s 24(6)

F *Ronny Cham* (*Ronny Cham & Co*) for the plaintiff.
David Fung Yin Kee (*Alex Pang & Co*) for the defendants.

Suleiman Hashim J: This is the defendants' notice of motion for a committal order against the plaintiff dated 28 November 1995 with the
G defendants' affidavit-in-support and the statement pursuant to O 52 r 2(2) of the Rules of the High Court 1980 both dated 22 November 1995. The statement is as follows:

1 The applicants' name is Syarikat Kuin Je Sdn Bhd, the defendants abovenamed. They are a private company incorporated under the
H Malaysian Companies Act 1965 and limited by shares with its registered office at Block B, Lot 3, First Floor, Inanam New Township, Phase 1, 89350 Inanam, Sabah. They deal mainly in the extraction of timber.

2 The person sought to be committed is Anthony bin Dubis, the plaintiff abovenamed, who appears to be a trader or farmer, and residing at Kampong Tiong, Timbunan, Sabah.

I 3 The relief sought is an order that the plaintiff be committed to His Majesty's Prison for several contempts of this Honourable Court.

4 The grounds upon which relief is sought are as follows:

(a) that the plaintiff has breached and continues to breach a judgment of the Honourable Dato' Justice Suleiman bin Hashim dated the 22 August 1995 wherein the plaintiff whether by himself, his

servants, agents, attorneys or any of them or otherwise, apart from the defendants, be restrained forthwith from amongst others, interfering with any part of the defendants' operations or work on the parcel of State land situated at Ulu Sungai Kionap and Sungai Kiayop, Tambunan, measuring about 2,000 acres for which TOL No 14950255 has been issued ('the said land') or with any persons employed or engaged by the defendants to work on the said land;

(b) that the plaintiff, by himself, his servants, agents, or attorneys or any of them, has breached and continues to breach this Honourable Court's judgment by interfering with the defendants' operations or work on the said land and by interfering with the defendants' servants working on the said land, the particulars of breach of which are as follows:

(i) by entering the said land and threatening to harm them if they carry on extracting timber on the said land;

(ii) by insisting that he, his servants, agents, or attorneys has or have the right to extract and remove timber from the said land;

(iii) by setting up camp in the said land, and by maintaining at least three people at any one time on the said land to undermine and intimidate the defendants and their servants or workers, and to prevent them from removing any timber out of the said land;

(iv) by erecting two barriers or gates at two different places across the passage in the said land, which passage is used by the defendants to transport their servants or workers and their equipment, as well as to remove timber extracted from the said land;

(v) by constructing another road or passage towards the back of the said land;

(vi) by generally taking action intended to interfere with the defendants' and their servants' or workers' timber operations on the said land, and thus in breach of this Honourable Court's judgment dated 22 August 1995; and

(c) the aforesaid breaches of this Honourable Court's judgment are in disobedience to the judgment requiring the plaintiff to abstain from doing the aforesaid restrained act, and which judgment is enforceable, with the leave of this Honourable Court, by an order of committal against the plaintiff under RHC O 45 r 5(1)(a)(i) and O 52 r 2(2).

The plaintiff's affidavit-in-opposition is dated 27 February 1996. The defendants' affidavit-in-reply is dated 29 February 1996. The defendants have also tendered a bundle of authorities dated 29 February 1996.

The contempt alleged and complained of by the defendants against the plaintiff is that the plaintiff is in contempt of the consent judgment dated 22 August 1995, which states:

JUDGMENT

UPON READING the summons in chambers of the abovenamed defendants and the other documents in the court file

AND UPON HEARING Leong Shin Heng, Esq, of counsel for the plaintiff and David Fung Yin Kee, Esq, of counsel for the defendants

BY CONSENT IT IS ADJUDGED that the plaintiff's action be dismissed

AND BY CONSENT IT IS ADJUDGED that the plaintiff whether by himself, his servants, agents, attorneys or any of them or otherwise apart from the defendants be restrained forthwith from doing the following acts or any of them, that is to say:

(1) interfering with any part of the defendants' operations or work on the parcel of State land situated at Ulu Sungai Kionap and Sungai Kiayop, Tambunan, measuring about 2,000 acres for which TOL No 14950255 has been issued ('the said land') or with any persons employed or engaged by the defendants to work on the said land;

(2) cutting, collecting, felling, converting or extracting and removing any timber forest produce from the said land upon the premise that the plaintiff has already duly authorised and employed the defendants as his contractor to enter the said land and to cut, fell, collect, extract and remove timber or forest produce from the said land

AND IT IS ORDERED that by this final judgment the plaintiff and the defendants be released from all their previous respective undertakings given in this suit

AND IT IS FURTHER ORDERED that each party do bear his or their own costs.

Dated this 22 August 1995.

Perhaps it would not be irrelevant to look at the background leading to the present application for the committal order now before me. This is the plaintiff's originating summons No K24–153 of 1995 dated 4 December 1995 against the defendants for:

(a) a declaration that the Licence to Take Forest Produce REF No JP(NTB) 008/95(FL) dated 20 March 1995 in respect of 2,000 acres more or less situate at Sungai Kionap, Tambunan ('the Licence') issued to the plaintiff is personal to the plaintiff and is not transferable in any manner whatsoever;

(b) a declaration that the settlement agreement dated 19 August 1995 between Anthony bin Dubis and Lian Huat Sawmill (Sabah) Sdn Bhd and Syarikat Kuin Je Sdn Bhd purporting to transfer the plaintiff's rights under the Licence is null and void ab initio;

(c) a declaration that the consent judgment dated 19 August 1995 in Suit No K22–58 of 1995 and the consent judgment dated 19 August 1995 in Suit No K22–82 of 1995 purporting to transfer the plaintiff's rights under the licence is null and void ab initio and be set aside;

(d) a declaration that the timber agreement dated 21 June 1988 entered into between Anthony bin Dubis and Lim Chian Herr @ Lim Chiang Hee purporting to transfer the plaintiff's rights under the licence is null and void ab initio;

(e) costs; and

(f) such further or other orders and relief as this Honourable Court deems just and proper.

The defendants' affidavit-in-opposition is dated 11 December 1995.

At the hearing before me on 12 December 1995 I was given and I am grateful to have the plaintiff's bundle and supplemental bundle of authorities dated 11 December 1995 and 12 December 1995, the defendants' bundle of authorities dated 11 December 1995 and written skeletal submission dated 12 December 1995. A

The chronology of events and the facts in the originating summons were I think not in dispute and are as set out in the plaintiff's affidavit-in-support dated 30 November 1995 as follows: B

3 I applied to the State Government of Sabah to extract timber about 10 years ago and my application was approved vide a letter from the Chief Minister's Department bearing reference MNR 114/22/2116/32 dated 13 May 1988 (hereinafter referred to as 'the said letter of approval') which confirmed the approval of my aforesaid application by the State Government. A copy of the said letter of approval is now produced and shown to me marked 'A'. C

4 In 1991, after completion of the survey of the land at the location applied for, the Department of Lands and Surveys issued a Temporary Occupation Licence bearing Serial No 14950255 (hereinafter referred to as 'the TOL') to me to log according to the licence to be granted to me by the Forestry Department and the conditions stated in the said letter of approval. The TOL was in respect of an area of about 805 hectares (about 1989 acres) as identified in a plan No 14125918 annexed thereto (hereinafter the parcel of land in respect of which the TOL was issued shall be referred to as 'the said land'). D E

5 The TOL was initially valid for the whole of the year 1992 and was subsequently renewed for the period from 1993 to 1995 (inclusive). A copy of the TOL is now produced and shown to me marked 'B'.

6 A Licence to Take Forest Produce No JP(NTB) 008/95(F1) was issued to me on 20 March 1995 authorising me to extract and take round logs from the said land effective from that date till 19 March 1996 (hereinafter referred to as 'the said licence'). A copy of the said licence is now produced and shown to me marked 'C'. F

7 I, on 21 June 1988, entered into an agreement for the extraction of timber from the said land with the first defendant. A copy of the extraction of timber agreement dated 21 June 1988 is now produced and shown to me marked 'D'. G

8 I had also on 21 June 1988 granted a power to attorney to one Lim Tian Tong. A copy of the power of attorney is now produced and shown to me marked 'E'. On the same date, the said Lim Tian Tong appointed the first plaintiff as substitute attorney for me. A copy of the appointment of substitute dated 21 June 1988 is now produced and shown to me marked 'F'. H

9 I had also on 21 June 1988 entered into an agreement for the sale of timber extracted from the said land to the second defendant. A copy of the sale and purchase of timber agreement dated 21 June 1988 is now produced and shown to me marked 'G'. I

10 I had also on 21 June 1988 entered into a timber agreement for the sale of all the timber extracted from the said land to the third defendant. A copy of the said timber agreement is now produced and shown to me marked 'H'.

11 I did on 5 December 1994 cancel the said extraction of timber agreement, revoke the said power of attorney and also cancelled the said sale and purchase of timber agreement. Copies of the said cancellations and revocation are now produced and shown to me in a bundle marked 'I'.

12 As a consequence of my said cancellations and revocation as stated in para 11 above the first and second defendants filed a claim in the High Court in Sabah and Sarawak at Kota Kinabalu against me (hereinafter referred to as 'the first suit'). A copy of the writ of summons is now produced and shown to marked 'J'.

13 I had also filed a claim against the first defendant in the High Court in Sabah and Sarawak at Kota Kinabalu (hereinafter referred to as 'the second suit'). A copy of the writ of summons is now produced and shown to me marked 'K'.

14 As a consequence of the first and second suits, I and the first and second defendants entered into a settlement agreement dated 19 August 1995. A copy of the said settlement agreement is now produced and shown to me marked 'L'.

15 Pursuant to the said settlement agreement, consent judgments were entered into in the first and second suits. Copies of the said consent judgments are now produced and shown to me in a bundle marked 'M'.

...

23 I have been advised by my present solicitors, and verily believe, that the said licence is personal to me and is not transferable in any manner whatsoever pursuant to s 24(6) of the Sabah Forest Enactment 1968.

24 I have been further advised by my present solicitors, and verily believe, that the settlement agreement, the two consent judgments and the timber agreement are illegal as they are all part and parcel of a device to circumvent the provisions of s 24(6) of the Sabah Forest Enactment 1968.

25 I am also advised by my solicitors and I verily believe, that the defendants accordingly have no rights whatsoever pursuant to the said licence, the settlement agreement, the two consent judgments and the timber agreement.

26 In the circumstances, I respectfully pray for the relief prayed in the originating summons herein.

At the hearing before me on 12 December 1995 the defendants' affidavit-in-opposition dated 11 December 1995 was confined to 'raising this estoppel as a preliminary question to be determined at the outset of the hearing of this originating summons' as follows:

4 I have been advised by my advocates that the plaintiff is estopped by the final judgment for Suit No K22–58 as well as the final judgment for Suit No K22–82 (both dated 22 August 1995) from seeking this Honourable Court's determination of the issues raised in this originating summons.

5 I am now raising this estoppel as a preliminary question to be determined at the outset of the hearing of this originating summons. For the purpose only of replying to the plaintiff's affidavit in respect of the preliminary question, I crave leave of this Honourable Court to refer to the plaintiff's affidavit at the following places.

'The first suit' and 'the second suit' (paras 12 and 13 of the plaintiff's

affidavit-in-support dated 30 November 1995) are the Suit No K22–58 and the Suit No K22–82 (para 4 of the defendants' affidavit-in-opposition dated 11 December 1995). A

The 'consent judgments' (para 15 of the plaintiff's affidavit dated 30 November 1995) are the two 'final judgments' (para 4 of the defendants' affidavit-in-opposition dated 11 December 1995). B

At the hearing before me on 12 December 1995 counsel for the defendants tendered the skeletal submission dated 12 December 1995 in support of the contention of estoppel and counsel for the defendants added, 'more particularly res judicata' and my ruling was:

> With respect [the] court does require to hear further submission on the issue/s of, according to Mr David Fung, estoppel, more particularly res judicata. [The] court rules that estoppel, res judicata, [is] not applicable. [The] court proposes to hear [the] plaintiff's originating summons dated 4 December 1995 ... C

On 12 December 1995 counsel for the defendants then requested that I stay proceedings while the defendants go on appeal against my ruling, which request for stay with respect I refused, and I ordered that the hearing of the originating summons proceed. D

Counsel for the defendants then requested, supported by counsel for the plaintiff, that the defendants be given the opportunity to file an affidavit-in-opposition on the issue of legality or otherwise, raised in the originating summons. Both counsel agreed that this affidavit-in-opposition be filed for me to hear the originating summons on 15 December 1995 at 2.30pm. E

Upon further discussion between counsel it was agreed that on the issue of legality or otherwise the court would consider together the five documents referred to in paras 7, 8, 9 and 10 of the plaintiff's affidavit-in-support dated 30 November 1995. This was at the suggestion of counsel for the plaintiff and with respect would be as in *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 FC, where it was stated at p 203 that 'In the case under appeal the agreement and the power of attorney must be read together as they are interrelated.' F G

Here I pause a while and I give my reason for my ruling on 12 December 1995 against counsel for the defendants' contention of estoppel, 'more particularly res judicata'.

As regards estoppel, if any, whatever mode of estoppel, it is clear. In *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 (FC) it was stated at p 24: H

> ... rule has long been established that *ex turpis causa oritur non actio*—no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated. The courts do not overlook the fact that they do not assist a person who comes with unclean hands. I

In *Cheng Mun Siah v Tan Nam Sui* [1980] 2 MLJ 269 it was stated:

A It seems to me that this issue is further governed by the maxim '*in pari delicto potior est conditio defendentis*'. Under the maxim a party to an illegal contract who seeks to recover what he has transferred under it will normally be denied relief on the ground that he cannot be heard to allege his own turpitude and that any loss he may suffer is well-deserved.

B Therefore I was and I am of the opinion that as regards the originating summons, notwithstanding the two consent judgments, there being the issues of '*turpis causa*' and '*in pari delicto*' I do not think the two consent judgments could be an ouster of the court's jurisdiction to hear or determine the alleged issues of *turpis causa* and *in pari delicto*.

C As regards res judicata I do not remember having heard or determined this issue of legality or otherwise.

On 14 December 1995 counsel for the defendants filed a notice of appeal against my ruling on 12 December 1995 on the issue estoppel, 'more particularly res judicata'. On the same date counsel for the defendants filed a summons in chambers dated 14 December 1995 which was an D application for stay of proceedings of the originating summons.

On 15 December 1995 I dismissed with costs counsel for the defendants' summons in chambers dated 14 December 1995 for a stay of proceedings of the originating summons. In fact on 12 December 1995 I had made a similar ruling against counsel for the defendants' oral application E for stay. Counsel for the defendants then invited my attention to rr 13 and 14 of the Rules of the Court of Appeal 1994 and to *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 (CA) and requested that I adjourned the hearing of the originating summons for mention to 5 March 1996, which I did.

F On 18 December 1995 at my request counsel for both parties appeared before me with Miss Nar Chin Keow standing in for counsel for the defendants who was on leave and in Kuala Lumpur and I informed counsel that I did not think rr 13 and 14 of the Rules of the Court of Appeal 1994 and the *Vijayalakshmi* case was any bar to me continuing to hear the originating summons and that I proposed to continue to hear the G originating summons. I adjourned to to 28 December 1995 to await counsel for the defendants' return from leave.

On 28 December 1995 counsel for the defendants informed me that the appeal against my ruling on 12 December 1995 on the issue estoppel, 'more particularly res judicata' before the Court of Appeal had been fixed H for hearing on 8 January 1996. I adjourned proceedings before me to 12 January 1996.

On 12 January 1996 counsel for the defendants informed me that the Court of Appeal had allowed the appeal and [ordered] that there be a stay of proceedings of the originating summons. Also, on 12 January 1996, counsel for the plaintiff withdrew the originating summons with costs to be I taxed.

Hence the next step was for me to hear or determine the defendants' notice of motion for the committal order against the plaintiff dated 28

November 1995, a final matter still pending and which is now before me, and this I heard on 1 March 1995. A

The contempt alleged and complained of by the defendants against the plaintiff is as set out in the defendants' affidavit-in-support and the statement pursuant to O 52 r 2(2) of the Rules of the High Court 1980, both dated 22 November 1995, namely, that the plaintiff is in contempt of the consent judgment dated 22 August 1995, the basis for which is and which emanated from the five documents referred to in paras 7, 8, 9 and 10 of the plaintiff's affidavit-in-support of the originating summons: B

(1) Para 7 — Extraction of timber agreement between plaintiff and first defendants dated 21 June 1988. C

(2) Para 8 — Power of attorney from plaintiff to one Lim Tian Tong and appointment of substitute power of attorney, Lim Tian Tong to first defendants both dated 21 June 1988.

(3) Para 9 — Sale and purchase of timber agreement between plaintiff and second defendants, sale of the timber to second defendants dated 21 June 1988. D

(4) Para 10 — Timber agreement between plaintiff and third defendant, sale of the timber to third defendant dated 21 June 1988.

As the contempt alleged and complained of by the defendants against the plaintiff is that the plaintiff is in contempt of the consent judgment dated 22 August 1995, the basis for which is and which emanated from the five documents, I think I need to consider whether any of the five documents either singly or jointly 'read together as they are interrelated' (see *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (FC) at p 203), is or are *turpis causa* or *in pari delicto*, although the plaintiff has withdrawn its originating summons. E F

In *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 (FC), as can be seen from the language of the agreement between the appellants and the respondents in that case which is set out in full in the judgment, the agreement amounted to a transfer or assignment 'of the whole camp, ie lock, stock and barrel' and it is stated at p 164 that: G

> It is therefore clear from the agreement and the power of attorney that the respondents had assigned all their rights in the licence to the appellants and in so doing had parted with the whole of their interest in the licence. In other words, they had in effect transferred their rights in the licence to the appellants.

In *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (FC) it was stated at p 201: H

> The issue of illegality was thus raised. Counsel for both parties agreed to take this issue as a preliminary point under O 25 r 2 of the Rules of the Supreme Court. Consequently, the learned judge ruled that the agreement read with the power of attorney was in breach of the provisions of the Forests Enactment 1968 and was, therefore, illegal and any claim based thereon was unenforceable. He further held that appellants could not assert a cause of action on account stated without reference to the illegal contract. Appellants appealed on several grounds but mainly complaining that the learned judge was wrong on question of illegality. I

If I understand Encik Loo for appellants correctly, he had abandoned the contention that the special licence was not a licence within the meaning of s 24(b) of the Enactment. To his contention that the two documents were not sham documents and ex facie illegal, Encik Wong for respondents made clear that he did not dispute the contention but argued that the arrangements made by the parties under the two documents demonstrated the illegality. That the arrangements were made between two legal entities is not in dispute. Appellants contend that neither the agreement nor the power of attorney constitute any assignment or transfer of rights, privileges and liabilities of the licence. Appellants pointed out that the agreement was stated to be an agency agreement and to all intent it was such an agreement. Respondents made the point that although the agreement was purported to be an agency agreement, in actual fact it was not so. *Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366 was cited in support. Appellants pointed out that in *Ebbw Vale Urban District Council*'s case there was no evidence that the commission had in fact appointed the company to act as their agent. In the absence of an agency contract between the two companies one cannot be said to be the agent of the other. An agreement may be such an agreement. This is of course a matter for the court to construe.

...

Just as the financial arrangements for the payment to the licensees is fatal in *Lo Su Tsoon*'s case [1971] 2 MLJ 161, so also is such financial arrangement between appellants and respondents fatal to appellants' claim as it is a part of the consideration for the assignment to respondents of their rights under the special licence. One of the main reasons for the arrangements under the cover of the two documents is to ensure that respondents have complete control of the business aspects of the two companies and that they would be able to recoup their investments plus substantial profits for both parties. Another reason is to deceive others into believing that respondents were agents when in actual fact all rights have been assigned to them. In other words respondents had stepped into appellants' shoes by acquiring all the rights under the special licence for all purposes.

...

In the case under appeal the agreement and the power of attorney must be read together as they are interrelated. By these two documents appellants had unreservedly assigned all their rights in the special licence to respondents. The appellants had nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with their rights under the licence. They had parted with all their interests in the licence for financial consideration. In effect, they had transferred their rights in the licence to appellants. In my view the agreement is clearly illegal, being in breach of s 24(6) of the Enactment. Consequently, any claim based thereon cannot succeed as it would be tainted with illegality. The power of attorney is necessary if respondents were to deal with others in such timber business, particularly with the Forest Department. As Ismail Khan CJ remarked in *Lo Su Tsoon*'s case [1971] 2 MLJ 161 the power of attorney was merely 'a colourable device to deceive others, particularly the Forest Department into believing that appellants (in our case respondents) were operating as agents for the licensees.

Nam Seng Co v Wing Yew (Tawau) Co Sdn Bhd [1978] 2 MLJ 198 (FC), *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 (FC), and *Tan Lai v Mohamed bin Mahmud & Ors* [1982] 1 MLJ 338 are also cases of *ex turpis causa* and *in pari delicto*.

The five documents

With the extraction of timber agreement dated 21 June 1988 (the first document) the plaintiff engaged the first defendant to extract timber for which the plaintiff was to pay the first defendant the agreed rate. The timber was to remain the property of the plaintiff, the plaintiff was to pay royalties and other payments to the government and the plaintiff was to obtain all the necessary licences, permits and passes to facilitate the extraction; this is I think a run of the mill agreement, not that the plaintiff handed over 'the whole camp, ie, lock stock and barrel', not that the plaintiff 'parted with the whole of their interest in the licence'; it was not 'a cover to ensure the defendants have complete control of the business aspects', not a deception that any of the defendants are mere agents 'when in actual fact all rights have been assigned to them', not a case where the plaintiff had 'nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with their rights under the licence', it was not a 'colourable device to deceive others ...' that the defendants 'were operating as agents for the licensees' (see *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 (FC) and *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (FC)). Thus I find that this extraction of timber agreement dated 21 June 1988 (the first document) by itself is not illegal as being any attempt to circumvent the condition of the licence as to its non-transferability to non-licensees under s 24(6) of the Forest Enactment 1968.

With respect, the power of attorney and the substituted power of attorney (the second and third documents) were merely to implement the extraction of timber agreement dated 21 June 1988 (the first document), subject to and within the circumscribed limits stipulated in the agreement. Thus I also find that these two documents (the second and third documents) are not illegal as being any attempt to circumvent the condition of the licence as to its non-transferability to non-licensees under s 24(6) of the Forest Enactment 1968.

The two remaining agreements are the sale and purchase of timber agreement between the plaintiff and the second defendant and the timber agreement between the plaintiff and the third defendant both dated 21 June 1988 (the fourth and fifth documents).

To begin with, to say the least, it is odd that there should be two agreements, both of the same date to sell the same produce to two different persons, namely the second defendant and the third defendant. The first agreement was for the sale to the second defendants of 'all the commercial timber extracted from the said land' and the second agreement was for the sale to the third defendant of 'all the merchantable timber on the said land'; the said land in both agreements being the same land. I think 'commercial timber' and 'merchantable timber' refer to the same subject matter; the use of the two different words amounts to a pun, a spurious use of words really.

Be that as it may be, given the interpretation most favourable to the defendants who now seek to uphold and to affirm these five documents as

A legal, it may well be that the sale agreement to the second defendant (the fourth document) is not *ex turpi causa* or *in pari delicto* because of the restraining curtailment clause in the said agreement, namely:

> 5 The landowner shall pay the following costs and any other costs (hereinafter referred to as 'the costs of operations') that may be incurred in the process of extracting and selling of the timber logs from the said land:
>
> (a) Royalties charges which fluctuate;
>
> (b) Contractor's fees which fluctuate from time to time;
>
> (c) Timber development charge which fluctuates;
>
> (d) Such other charges or cess leviable by the appropriate authorities from time to time.

But the sale agreement to the third defendant (the fifth document) is without any such or equivalent restraining curtailment provision. On the contrary cll 4 to 8 and 21 of the agreement (the fifth document) are as follows:

> 4 In the event of cancellation of the said timber area due to no fault of the first party, the second party shall be entitled to take whatever actions it deems necessary expedient against the relevant authorities and shall be entitled to all the compensation damages but shall have no course of actions against the first party for payments made pursuant to cl 2 hereinabove.
>
> 5 The first party shall permit the second party to use all the existing facilities and the access roads acquired or to be acquired by the first party for the timber operations on the said land and shall ensure the continued use by the second party without any interruption or hindrance from any third party provided that any rentals or charges payable to the third party shall be borne by the second party. If the second party shall require other access roads over lands belonging to other persons or the government, the first party shall undertake to use their best endeavours to obtain such access roads for the second party and any expenses incurred thereby shall be borne by the second party.
>
> 6 The second party shall be responsible for providing the bank guarantee required by government for the extraction of the timber from the said land.
>
> 7 The second party shall pay all royalties, extraction charges, if any, and the net proceeds to the trust account for the development of the said land. It is understood that the net proceeds are paid on account of the first party for agricultural development and the second party shall have no claim in respect thereof.
>
> 8 The second party shall make his own arrangements for the extraction, removal, shipment and export or otherwise of timber but the first party shall whenever requested by the second party assist the second party in obtaining such facilities including quotas from government provided that any expense to be incurred for the purpose shall be borne by the second party.
>
> ...
>
> 21 The second party shall have full power to manage the affairs in connection with the timber extraction and production of logs and timber for the said

area including the organization of the timber extraction, the re-organization thereof, extraction of timber and processing of timber. The first party shall have no right to intervene in the disposal of the foregoing affairs. The first party shall not make any excuse of any reason or particular circumstances or causes in connection with the government to cancel or suspend this agreement. Otherwise the first party shall compensate the second party all the profits it might have accrued from this agreement or any actual loss sustained by the second party as a result of such interference by the first party.

I would like to use again for my guidance *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161 (FC) where the language of the agreement between the appellants and the respondents in that case, as set out in full in the judgment, can be seen, and *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (FC). The sale agreement to the third defendant (the fifth document), as in the cases of *Lo Su Tsoon* and *Sundang Timber Sdn Bhd*, was clear abdication and gay abandon by the plaintiff of its interests under the licence. This included the third defendant having 'complete control of the business aspect' to deceive others into believing that the third defendant was an agent when in actual fact all rights had been assigned to the third defendant, with the plaintiff having 'nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with his rights under the licence'. This was a 'colourable device to deceive others' that the third defendant was operating as an agent for the plaintiff.

And with respect, reading the language of this fifth document together with the other four 'interrelated' documents (see *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200 (FC) at p 203) I find and I rule that the transaction between the plaintiff and the defendants is *ex turpi causa* and *in pari delicto*, which perhaps explains why all five documents were executed on the same day, namely 21 June 1988. This at the outset seemed suggestive of a sleight of hand.

The contempt alleged and complained of by the defendants against the plaintiff is that the plaintiff is in contempt of the consent judgment dated 22 August 1995, the basis for which is and which emanated from the five documents. I find and I rule *ex turpi causa* and *in pari delicto*.

The defendants now seek a committal order against the plaintiff 'under an illegal transaction in which he has participated. The courts do not overlook the fact that they do not assist a person who comes with unclean hands' (see *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 (FC) at p 24).

The defendants' notice of motion for a committal order against the plaintiff dated 28 November 1995 is dismissed with costs.

Application dismissed.

Reported by Izzaty Izzuddin